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IN THE

# Supreme Court of the United States

October Term 1944

No. 694

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ISAAC TRAININ,

*Petitioner,*

against

DAVID E. CAIN, Commanding Officer of Camp Upton.

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## PETITIONER'S REPLY BRIEF

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OSMOND K. FRAENKEL,
*Counsel for Petitioner.*

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## PETITIONER'S REPLY BRIEF

Respondent's brief contains various misconceptions of petitioner's contentions, inaccurate statements and unsound arguments that require brief consideration.

1. Respondent recognizes (Brief p. 14) the importance of the question of the scope of judicial re iew in a habeas corpus proceeding such as this and that this Court has never passed on the point. Respondent suggests, however, that the correct rule was stated in *Ex parte Stanziale*, 138 F. (2d) 312, a decision which this Court refused to review (320 U. S. 797). There the Circuit Court of Appeals for the Third Circuit expressed the opinion that the courts could not at all examine the evidence considered by a draft board, but could determine only if the registrant had been afforded an opportunity to present his case. We cannot believe that this restricted view of the rights of registrants can meet with the approval of this Court. Under such a doctrine a draft board could flout the law by simply listening to a registrant and then, without any substantial

basis for so doing, disregard all his proof and arbitrarily reject his claim for exemption.

The *Stanziale* case, however, presented a different problem from the case at bar, for in that case there was no right to exemption because of dependents, not even an absolute right to deferment. Regardless, therefore, of the character of the evidence on the issue of dependents there were other considerations which might have justified the Draft Board action in that case, considerations with which the courts could have no concern in the absence of a showing of discrimination. But in the case at bar petitioner was entitled to complete exemption if he was a rabbi. That exemption had been twice granted him; it could not be taken away except on the basis of substantial proof. That there was no such substantial proof contrary to his claims we have already demonstrated in our main brief. The issue of the scope of judicial review is, therefore, necessarily presented in this case.

2. It is difficult to understand the reference (Brief p. 16) to credibility in connection with the issue of petitioner's ordination. No one ever suggested that the certificates of ordination had not been given by the rabbis whose names they bore—indeed two of the three were among the rabbis who vouched for petitioner before Mr. Goldman in December, 1943 (R. 116, 122). Nor did anyone ever question the right of these rabbis to ordain petitioner (see R. 37, 38, 43). The only other aspect of this issue was the sufficiency of the certificates. And that also involved no issue of credibility. For there was no evidence whatever before the Draft Board to challenge the statement of the rabbi of its own choice that these certificates were proper ones (R. 38).

Respondent (pp. 4, 5) suggests that there was evidence before the Draft Board that it was usual for certificates of ordination to contain certain words. But this is not the fact. The record references given in respondent's brief

(R. 98, 101) are not to anything in the draft file or to any witness who appeared before the Board. The references are to the testimony of Rabbi Goldstein before Judge Inch —and even his testimony does not justify the conclusion that the certificates were not in the form required by Hebrew law.

This question of the form of the certificates is repeated (p. 17) by the statement that the panel inquiry showed that the certificates were not "in the customary form". But that inquiry showed no such thing. It developed only the fact that the certificates did not contain certain words. There is absolutely nothing in the panel minutes (R. 125-140) to show that these, or any other words, were necessary, or indeed customary. While it is true that the panel made a rather vague statement on this subject (R. 21), this statement was not known to the Draft Board when it reclassified petitioner (R. 32) and was never seen by the Appeal Board (R. 61, 62). So if, as respondent argues (Brief p. 14), it is the record before the Appeal Board which is decisive then the reasons given by the panel for rejecting petitioner's claim must be disregarded.

Consequently there is no foundation to the claim that the Draft Board had evidence from which it could disregard the statements of all the rabbis who appeared before it that petitioner had been duly ordained. There was no room for any question of credibility whatever.

3. Respondent's brief falls into the same error as did Rabbi Goldstein in casting doubt upon petitioner's performance of functions by referring to the fact that persons not ordained as rabbis might perform some of these functions (Brief p. 17, R. 107). That can have nothing to do with the case at all. The crucial fact is that petitioner claimed that he had functioned for some years as the rabbi of a congregation located within a mile of the Local Board's office, that his claim was accepted even after the receipt of a complaint in 1942 (R. 65, 66) and then was rejected arbitrarily, without any attempt to inquire into the facts.

Such administrative action cannot be defended by the argument that the Board did not believe petitioner. It believed him in 1942; it could not arbitrarily change its position in 1943. Indeed it is probable that petitioner was not reclassified on that score; for Mr. Goldman admitted that petitioner was functioning (R. 42) and the emphasis before the Local Board was entirely upon the issue of ordination.

Respondent's brief twice refers (R. 11, 17) to certain testimony before the panel as indicating that petitioner had not functioned as a rabbi. The references are to a statement volunteered by petitioner with regard to his efforts to enlist as a chaplain (R. 126). It is evident, however, that this statement was not correctly reported. For petitioner denied that he had said this (R. 66, 67), and that testimony was given prior to the time that Rabbi Goldstein testified. Yet the rabbi, who had been present at the panel hearing (R. 97), did not contradict petitioner. Surely no use can properly be made of this erroneous reporting.

4. Respondent entirely misconceives (note 13, p. 18) the basis of petitioner's objection to the receipt in evidence of the three documents not seen by the Appeal Board at all and not seen by the Local Board until the eve of petitioner's actual induction. Petitioner's argument is not that the additional proof furnished no basis for a reclassification. He claims that any further consideration of petitioner's status after he had been ordered to report for induction was in plain violation of the regulations (§ 626.2) and that it constituted a denial of due process since petitioner was not advised of the Board's action or given any opportunity to be heard. Respondent has in no way met these contentions.

5. Respondent also (pp. 18-22) misconceives petitioner's objection to the functioning of the panel. Respondent (p. 22) says that the panel performed the same function as an expert witness performs in a law suit. But that is

just what the panel did not do. The expert is cross-examined by the party—here the party was cross-examined by the so-called expert. Respondent's analogy is not a happy one.

Petitioner recognizes the right of the Selective Service System to avail itself of voluntary services and of expert advice. We insist, however, that this was not done in the case at bar. At the risk of repetition we point out that this panel was never called on to express any expert opinion on those points on which its views might have had value, namely, the right of one rabbi to ordain another, or the form of the ordination certificates. Moreover, even if this had been done there would still have been a denial of due process here since petitioner was never informed that any such opinion had been rendered or given an opportunity to meet it. There is nothing in the long quotation from Col. Durham's testimony (Brief pp. 19-21) which touches on this basic problem at all. The denial of due process was flagrant and should not be allowed to pass.

Respectfully submitted,

Osmond K. Fraenkel,
Counsel for Petitioner.